Supreme Court, U.S.
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No. 91-2068

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE LAITRAM CORPORATION
and INTRALOX, INC.,

Petitioners,

v.

THE CAMBRIDGE WIRE CLOTH COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Federal Circuit improperly affirm the District Court's Summary Judgment Order (reinstating the District Court's prior summary judgment on the issue of non-infringement) after determining that subject matter jurisdiction existed.

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OCTOBER TERM, 1992

THE LAITRAM CORPORATION and
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THE CAMBRIDGE WIRE CLOTH COMPANY,

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

The statement of the case presented by Petitioners, The Laitram Corporation and Intralox, Inc. (hereinafter collectively "Laitram"), is a rendition of the factual history of the case which is intertwined with argument and which omits various key facts. Therefore, Respondent, The Cambridge Wire Cloth Company[1] (hereinafter "CWC"), presents the following counterstatement of the case.

This is a patent infringement case in which a variety of custom-assembled, modular conveyor belts, marketed by CWC under the general designation CRB-3000,

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[1] Respondent has no parent companies or subsidiaries in accordance with the understood meaning of Rule 29.1.

were charged by Laitram with infringement of certain of Laitram's patents.

On November 1, 1989, the U.S. District Court for the District of Maryland granted CWC's motion for summary judgment of non-infringement and entered judgment against Laitram (Pet. App. 24a).[2] This judgment was supported by a memorandum opinion (Pet. App. 25a-31a) in which the District Court specifically recognized that certain features or characteristics of the accused CRB-3000 belts did not infringe the patents in issue (Pet. App. 26a-27a; Pet. App. 29a-30a). The District Court made this determination based upon comparing the claims at issue with characteristics common to all the CRB-3000 belts. Id.

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[2] The Appendix to Laitram's Petition for a Writ of Certiorari is referred to herein by page as "Pet. App. __."

Laitram appealed the District Court's November 1, 1989 Order, and the United States Court of Appeals for the Federal Circuit vacated the summary judgment because it was believed that there was a possibility that no accused product existed at the time the complaint was filed (Pet. App. 16a). The Federal Circuit, therefore, remanded the case to determine whether subject matter jurisdiction existed (Pet. App. 18a), and the District Court held an evidentiary hearing directed to this question on February 11, 1991 (Pet. App. 21a-23a).

Being cognizant of the fact that the accused CRB-3000 belts were custom-made and can take various configurations, the District Court found that PX-1 (which was before the District Court at the hearing on remand) was "an exemplar of what could be constructed out of the design that is

charged as the infringing design" (Pet. App. 35a).

The District Court then found that PX-1 was made and offered for sale as of March 15, 1989 (the date the complaint was filed), and that such was sufficient to provide subject matter jurisdiction (Pet. App. 35a).

At the February 11, 1991 hearing on remand, Laitram's counsel argued that summary judgment should not be entered "with regard to products that we have never even accused" (Pet. App. 43a). The District Court, however, stated that its judgment was entered with regard "to the entire complaint" (Pet. App. 22a) (emphasis original). ("A summary judgment goes to the entire complaint" (Pet. App. 43a)). That is, the complaint did not accuse any specific or particular modular assembly of a CRB-3000 belt, but

only alleged that CWC was infringing "by making, using, or selling conveyor belts or modules, namely, its CRB 3000 modular plastic belts" (Resp. App. 4a, 5a-6a[3]; emphasis added).

The District Court, having found that PX-1 (which existed at the time the complaint was filed) was an exemplar of the allegedly infringing CRB-3000 belts and that therefore subject matter jurisdiction existed, saw "no reason to take away defendant's victory on the merits by re-opening the case for further summary judgment proceedings or trial" (Pet. App. 22a). The District Court, therefore, entered summary judgment on remand "on the reasoning of this Court's

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[3] The supplemental Appendix following Respondent's Brief is referred to herein by page as "Resp. App. ___."

[the District Court's] prior summary judgment opinion" (Pet. App. 23a).

Laitram appealed the District Court's entry of summary judgment, but specifically chose to avoid appealing the merits of the summary judgment, notwithstanding the fact that the District Court specifically entered summary judgment on the merits in favor of CWC. In fact, Laitram's grounds for appeal was set forth as a single issue: "Whether the District Court erred as a matter of law in granting summary judgment of non-infringement without comparing the claims at issue to the accused product." (Resp. App. 18a).

In its February 11, 1991, Memorandum Opinion, the District Court specifically indicated that it was reinstating its judgment on the merits:

> Now that this Court has answered the question [of whether subject matter jurisdiction was present] in the affirmative, it will reinstate the judgment on the merits heretofore rendered for the defendant, on the defendant's earlier motion for summary judgment.

Pet. App. 22a.

During the remand hearing, The District Court had specifically put Laitram on notice as to its reasoning, stating:

> The merits were fully reached earlier. That is the law of the case, and there you have it. If the Federal Circuit thinks, in the interest of justice, that that grant of summary judgment was based on some faulty premise, they can vacate it and send it back and we will try it.

Pet. App. 44a.

Upon entry of the District Court's Order, judgment on the merits had unquestionably been entered (Pet. App. 19a and 20a) and Laitram had an opportunity to (but chose not to) present

the merits of the summary judgment in its appeal.

The Federal Circuit affirmed the District Court's grant of summary judgment (Pet. App. 2a) and, after noting that Laitram had not appealed the merits of the District Court's summary judgment ("Laitram provides this Court with no basis to further review the merits of the summary judgment"), left that judgment intact (Pet. App. 4a).

Laitram requested reconsideration of the Federal Court's decision and suggested rehearing in banc, arguing many of the same points raised in this petition. After considering the briefs of both parties, the Federal Circuit declined to rehear the appeal and denied the suggested rehearing in banc (Pet. App. 46a-49a).

REASONS FOR DENYING LAITRAM'S PETITION FOR A WRIT OF CERTIORARI

Laitram's Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit ("Laitram's Petition") should be denied because Laitram is merely complaining about its own choice as to what to appeal. Laitram's Petition meets none of the considerations which would favor granting a writ of certiorari as set forth in Rule 10 of the Supreme Court Rules. That is, Laitram presents no questions of special importance; has not alleged any conflict as between the Circuits, nor any departure from the accepted and usual course of judicial proceedings; and has not presented any question of federal law which needs to be settled by this Court. Laitram is merely using its last procedural avenue to

attempt to undo that which Laitram itself deliberately chose to do.

The basis of Laitram's Petition appears to be its allegation that it never had an opportunity to argue or appeal the merits of the District Court's summary judgment grant. However, there can be no question that Laitram was specifically on notice that the District Court entered summary judgment on the merits (see Pet. App. 22a; 44a). Laitram's choice not to argue the merits in its appeal was its own choice and certainly that failure presents no question which this Honorable Court needs to determine.

CWC addresses each of Laitram's specific proffered reasons for granting Laitram's Petition by the Roman numerals corresponding to those used by Laitram in its Petition.

I. The Federal Court's Alleged "Misapplication of Rule 56(c) Involving Hypothetical Facts"

A. This Issue Is Raised for the First Time in this Petition

Laitram should not be permitted to raise the issue of the Federal Court's alleged misapplication of Fed. R. Civ. P. 56(c) involving hypothetical facts because Laitram failed to raise that issue on appeal before the Federal Circuit.

More specifically, Laitram's first proffered reason for granting its Petition is based on the allegation that the District Court deprived Laitram of the procedural safeguards of Fed. R. Civ. P. 56(c) (Laitram's Petition at 8). As is apparent from Laitram's Statement of The Issues and Summary of the Argument contained in its Brief filed with the Court of Appeals for the Federal Circuit

(Resp. App. 18a-19a), Laitram failed to raise this issue on appeal below and is thus precluded from doing so before this Honorable Court. See Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 516 (1949).

B. Laitram Was Not Denied The Opportunity to Present Evidence Under Fed. R. Civ. P. 56(c)

In addition to Laitram's failure to raise the issue of the District Court's allegedly depriving Laitram of the opportunity to present evidence under Fed. R. Civ. P. 56(c), Laitram's reasoning is misplaced as to the basis of this allegation. Laitram had the opportunity to, and, in fact, did, present evidence of alleged infringement by the accused products, the CRB-3000 belts, during the initial summary judgment proceedings before the District

Court. Quite simply, however, throughout the appeals process, and before this Court in its Petition, Laitram has failed to come to grips with the fact that the accused products are custom-assembled belts constructed from four to six different modules (see Resp. App. 10a). These custom-assembled belts are of modular form and may be of varying lengths and widths and are known collectively as CRB-3000 belts (see Pet. App. 21a-22a; 26a-27a; 29a and Resp. App. at 10a-17a and 22a-24a).

In its original summary judgment opinion (November 1, 1989), the District Court found that products with the characteristics of the CRB-3000 did not infringe. Specifically, the District Court stated:

> The Court has no hesitation in concluding as a matter of law that the challenged product (CWC's CRB-

> 3000 belt) does not literally infringe either claim 19 of the '141 patent or claim 21 of the '949 patent.

Pet. App. 26a.

The District Court then considered the doctrine of equivalents and stated:

> [N]o reasonable trier of fact could conclude, on this record, that the CRB-3000 performs substantially the same function in substantially the same way to produce substantially the same result as the Laitram-patented belts.

Pet. App. 30a.

The Federal Circuit vacated and remanded on the basis of a suspected absence of any showing that at least one of the various CRB-3000 belts actually existed (thereby resulting in a lack of showing that the District Court had subject matter jurisdiction). At the remand hearing, the District Court focused its attention on that narrow issue (as directed by the Federal

Circuit) and found that a CRB-3000 belt in fact existed at the time the complaint was filed in the form of an exemplar of the various CRB-3000 belts, namely, PX-1 (Pet. App. 35a).

During the first summary judgment proceedings, Laitram clearly had an opportunity to present evidence and did present evidence as to the merits of alleged infringement by the accused device, namely, the CRB-3000 belts. The reason that the Federal Circuit found that the original grant of summary judgment was improperly based on "hypothetical facts" was that it had not been established that a CRB-3000 belt had been made at the time of filing the complaint.[4] Once that determination was

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[4] The Federal Circuit, in its first decision of November 21, 1990 (Pet. App. 6a), focused on demonstrative exhibits of

(continued...)

made, the only missing piece of the puzzle was in place and the District Court's analysis of non-infringement (based on evidence presented by both sides) was complete.

II. The Court of Appeals Did Not Misapply Rule 52(a) and Did Not Engage in Fact Finding

Laitram's assertion that the Federal Circuit engaged in improper fact finding is incorrect. The Federal Circuit's reliance on clear logic is not improper fact finding.

The focus of Laitram's argument here is the Federal Circuit's reasoning that "Necessarily, the [District Court's] comparisons of the CRB-3000 to the claims at issue encompass PX-1, as PX-1 is an 'exemplar,' i.e., a typical example, of

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[4](...continued)
belts which had not been made at the time the suit was filed (Pet. App. 8a-10a).

the accused design." Laitram's Petition at 12 (citing Pet. App. 4a). Clearly, the fact that PX-1 was an exemplar of the CRB-3000 belts was a finding of fact made by the District Court on remand, and the design of the CRB-3000 belts had been compared to the patent claims in the District Court's prior November 1, 1989 decision (Pet. App. 26a-27a; 29a-30a).

During the remand hearing, the District Court went to great lengths to establish that PX-1 was a CRB-3000, questioning the witness as follows:

> THE COURT: What is the relationship between what you have just described as CRB 3000 and that thing that is sitting in front of you, that gray thing, Plaintiffs' Exhibit 1 [PX-1] I think it is?
>
> THE WITNESS: That would be the exact thing, your Honor. This one has five modules -- five types of modules, because it includes the internal module, and that is exactly what I described.

THE COURT: So, that is the CRB 3000.

THE WITNESS: Yes, Your Honor.

THE COURT: Okay. And it did exist as of March 15th of 1989; is that correct?

THE WITNESS: Yes, it did.

Resp. App. 23a-24a.

The Federal Circuit, in its February 6, 1992 decision, after correctly observing that the District Court was no stranger to the parties or the subject patents (Pet. App. 3a-4a), found that:

> As stated in the original complaint, the accused product in this suit is the CRB-3000 modular plastic belt. In the memorandum accompanying the original grant of summary judgment, the district court made numerous comparisons of the accused CRB-3000 design to the claims at issue and determined that the accused design does not infringe the claims, either literally or under the doctrine of equivalents. Necessarily, the comparisons of the CRB-3000 to the claims at issue encompass PX-1, as PX-1 is an "exemplar," i.e., a typical example, of the accused design.

Pet. App. 4a.

This logical legal conclusion was not fact finding by the Federal Circuit. The District Court found that PX-1 was an exemplar of the accused CRB-3000 belts and that PX-1 existed at the time of the original complaint. The Federal Circuit correctly made the legal conclusion, from the District Court's fact finding, that the District Court's comparison of the claims to the accused products, the CRB-3000 belts, necessarily encompassed a comparison of the claims to PX-1 since the District Court found PX-1 to be a typical example of the accused CRB-3000 product design.

III. The Federal Circuit's Decision Does Not Conflict with Well-Established Precedent of the Federal Circuit

Here, Laitram mischaracterizes the District Court's February 11, 1989

decision. Laitram neglects to focus on the fact that the District Court's grant of summary judgment was based on the merits as determined in the original summary judgment proceedings coupled with the remand finding that PX-1 was an exemplar of the CRB-3000 belts which the Court had previously found to be of non-infringing design. In essence, Laitram argues that a comparison of the patent claims to the accused products was never made. This is not correct.

More particularly, Laitram asserts that the Federal Circuit improperly applied precedent in affirming the District Court's decision based upon "[a] comparison of nonaccused 'possible constructions' to the claims and followed by the subsequent comparison of the accused products to the nonaccused 'possible constructions.'" Laitram's

Petition at 14-15. In point of fact, the Federal Circuit's February 6, 1992 decision (from which this appeal is taken) is premised on the District Court's comparison of the claims at issue to the accused design of the CRB-3000 belts during the original summary judgment proceedings and the District Court's later finding that PX-1 was an exemplar of the accused design. That is, the accused product was the CRB-3000 belts which are capable of various physical sizes and shapes, all made with four to six different modules having certain common design characteristics.

The Federal Circuit correctly recognized that there is no legal requirement that the claims be compared to one exemplary physical representation of an accused product or that the accused product be in evidence at the time the

comparison is made, as long as a comparison is made of the claims to the accused product (the CRB-3000 belts), and as long as there was an accused product in existence at the time the complaint was filed. In this regard, the Federal Circuit held:

> [T]he fact that no actual product accused of infringement was admitted into evidence at the time of the original summary judgment does not, in itself, demonstrate legal error. While an actual accused product may be of significant evidentiary value on the issue of infringement, there is no evidentiary requirement that an accused product be admitted into evidence prior to a grant of summary judgment. What is required is that, based on evidence of record of whatever form, no genuine issue of material fact exists as to whether the accused product infringes the subject claims.

Pet. App. 4a.

In sum, the District Court compared the design of the accused CRB-3000 belts to the claims. The only issue taken with

the original District Court decision was the District Court's failure to find that there was in fact a CRB-3000 belt made, used or sold at the time of the filing of the complaint. The District Court made this finding at the remand hearing reinstating its original summary judgment, and the Federal Circuit correctly affirmed the District Court's decision after a well-reasoned analysis of the facts of record and the law.

IV. Laitram Was Not Denied Due Process

There is no question but that Laitram had the opportunity for appellate review of the merits of the District Court's grant of summary judgment of non-infringement. Laitram simply chose not to obtain such appellate review and instead avoided arguing the merits of the District Court's judgment. As discussed

above, there is no question but that Laitram was specifically put on notice that the District Court's ruling was on the merits. Laitram specifically admits that it "deliberately avoided the merits regarding infringement." Laitram's Petition at 15 (emphasis original). The fact that Laitram itself chose not to appeal the merits, does not mean that Laitram was denied due process.

Laitram's reason for deliberately avoiding the merits regarding infringement, is that "[u]nder the threat of sanctions from the first appeal and the law of the case, Laitram had no merits to appeal in the present case." Laitram's Petition at 16. Laitram further states, "There were no findings of noninfringement related to an actual product (PX-1) charged with

infringement." Id. Laitram's reasoning is incorrect.

First, even if Laitram perceived that there was a "threat of sanctions," such did not mean that there were no merits to appeal. The District Court made it abundantly clear that its ruling was a ruling on the merits which the Federal Circuit could review. Laitram merely imposed its view of the case (that there was no ruling on the merits) in lieu of the clear statement to the contrary by the District Court and decided to ignore the District Court's clear statement that its decision was on the merits.

Moreover, as to the purported "threat of sanctions" if Laitram did appeal, Laitram's interpretation of the Federal Circuit's prior decision is illogical and fails to recognize the basic fact that, on remand, the District Court found that

an accused product existed at the time the complaint was filed and thereby remedied the very defect which the Federal Circuit found in the prior appeal. Laitram's assertion that "[t]here were no findings of noninfringement of an actual product (PX-1) charged with infringement," flies in the face of the District Court's February 11, 1991 decision which unequivocally applied its prior November 1, 1989 decision to the accused products, the CRB-3000 belts, in the form of the PX-1 exemplar of a CRB-3000 belt.

Laitram asserts that during the appeal, it "would have been required to raise argument 'directed to products never charged as infringements' and 'about a product (PX-1) that was admittedly not before the district court' when the opinion issued." See Laitram's

Petition at 16. To the contrary, however, after the District Court's February 11, 1991 Order was entered, Laitram's arguments on appeal would have been directed to the CRB-3000 belts, of which PX-1 was an exemplar, and which the District Court specifically found was in existence at the time the complaint was filed.

Due process requires a meaningful opportunity to be heard. Boddie v. Connecticut, 401 U.S. 371, 378 (1971). It does not require that a party avail itself of that opportunity. Id. In fact, a deliberate decision not to appeal an issue which could have been appealed forfeits the right to appeal. See Dickinson, 338 U.S. at 516. Here, Laitram simply forfeited its right to appeal the merits by deliberately failing to address the merits of the District

Court's decision of February 11, 1991 (which incorporated the District Court's November 1, 1989 decision regarding the non-infringement of the CRB-3000 belts) in its appeal of that February 11, 1991 decision.

V. Laitram Had the Opportunity to Attempt to Establish the Existence of a Genuine Issue of Material Fact as to Whether the Accused Design Is Infringing

Here, Laitram focuses on the wrong issue in stating that there is a genuine issue of material fact as to whether PX-1 is representative of the products depicted in DX-A through DX-D. The proper inquiry which the District Court did undertake is whether PX-1 is a CRB-3000 belt which was accused of infringement (the District Court having previously found that the design of the accused CRB-3000 belts does not

infringe). As discussed above, a key fact in this case is that the accused CRB-3000 belts are custom-made and assembled from a number of different modules. Therefore, it was necessary for the District Court to determine whether the design of the belts constructed from these different modules was non-infringing. This is what the District Court did in its original decision in finding that the CRB-3000 belts have identifiable characteristics as to their design and thus do not infringe.

In the subsequent evidentiary hearing on remand, the District Court found that PX-1 was an exemplar of the non-infringing CRB-3000 and that such was in existence as of the filing date of the complaint, thereby establishing subject matter jurisdiction. In the District Court's Memorandum Opinion, the Court

found that it had already obtained sufficient evidence to hold that CRB-3000 belts did not infringe and that PX-1 was an exemplar of the non-infringing belt which was in existence at the time the complaint was filed. The District Court and the Federal Circuit correctly recognized that the complaint accused the CRB-3000 belts of infringement (not particular demonstrative exhibits DX-A through DX-D or even PX-1), and the District Court granted summary judgment as to the entire complaint. If Laitram disagreed with the District Court's non-infringement analysis, it should have argued the merits of the District Court's determination of non-infringement of the CRB-3000 belts on appeal, as there is no question but that the merits were ripe for appeal. Instead, Laitram deliberately declined to do so.

There is certainly no denial of due process in Laitram's choice not to appeal on the merits.

CONCLUSION

For the foregoing reasons, it is clear that Laitram raises no issue which requires determination by this Honorable Court. It is also clear that the Court of Appeal's decision is not erroneous. The District Court granted summary judgment on the basis of a comparison of an accused product, CRB-3000 belts, to the patent claims and subsequently found that an accused product existed at the time the complaint was filed (thus establishing subject matter jurisdiction). Far from being denied an opportunity to present evidence on the merits of infringement, such evidence was taken during the initial hearing on summary judgment. Laitram simply chose

not to appeal the decision on the merits and Laitram's own decision in that regard is not appropriate subject matter to bring before this Court. The Petition should be denied.

Respectfully submitted,

this 27th day of July, 1992.

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CERTIFICATE OF SERVICE

I hereby certify pursuant to Rule 29.3, that three true and correct copies of Brief for Respondent in Opposition to Petition for Writ of Certiorari were served by first-class mail, postage prepaid, on the following counsel for Petitioners:

Timothy J. Malloy, Esquire
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this 27th day of July, 1992.

Raymond A. Kurz, Esq.

RESPONDENT'S

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE LAITRAM CORPORATION AND INTRALOX, INC. both Louisiana Corporations of 220 Laitram Lane Harahan, Louisiana 70123 Plaintiffs, v. THE CAMBRIDGE WIRE CLOTH COMPANY a Maryland Corporation P.O. Box 399 Cambridge, Maryland 21613 SERVE ON: Edward N. Evans 105 Goodwill Road Cambridge, Maryland 21613 Defendant.	Civil Action No. _____ COMPLAINT REQUEST FOR JURY

ALLEGATIONS COMMON TO ALL CLAIMS

A. Jurisdiction

1. This is a civil action for patent infringement arising under the

Patent Laws of the United States, and more particularly, under Title 35 U.S.C. §§271, 281. This Court has jurisdiction under Title 28 U.S.C. §1338(a), and venue is proper pursuant to 28 U.S.C. §1400(b).

B. The Parties

2(a). Plaintiff, THE LAITRAM CORPORATION, is a corporation organized and existing under the laws of the State of Louisiana, having a regular and established place of business at 220 Laitram Lane, Harahan, Louisiana 70123.

2(b). Plaintiff, INTRALOX, INC., is a corporation organized and existing under the laws of the State of Louisiana, having a regular and established place of business at 220 Laitram Lane, Harahan, Louisiana 70123, and is a wholly-owned subsidiary of The Laitram Corporation.

2(c). THE LAITRAM CORPORATION and Intralox, Inc. are hereinafter referred to jointly as "Plaintiffs."

3. Defendant, THE CAMBRIDGE WIRE CLOTH COMPANY (hereinafter "CWC"), is a corporation organized and existing under the laws of the State of Maryland, with a regular and established place of business at 105 Goodwill Road, Cambridge, Maryland 21613.

COUNT I

4. The allegations of paragraphs 1 through 3 are incorporated herein by reference.

5. THE LAITRAM CORPORATION is the owner, by assignment, of the entire undivided right, title, and interest in and to United States Patent No. 3,870,141, entitled "Modular Belt," which issued on March 11, 1975. Intralox, Inc. is the exclusive licensee of said patent.

6. Intralox, Inc. is the exclusive licensee of THE LAITRAM CORPORATION under U.S. Patent 3,870,141.

7. Defendant, CWC, has been, and still is, infringing U.S. Patent No 3,870,141, and is inducing and contributing to the infringement thereof by others, by making, using, or selling conveyor belts or modules, namely, its CRB 3000 modular plastic belts, embodying the patented invention, and will continue to do so unless enjoined by this Court.

8. Said acts of infringement have been willfully committed both within this judicial district and elsewhere.

9. As a result of the aforementioned actions of defendant, plaintiffs have been and continue to be damaged.

COUNT II

10. The allegations of paragraphs 1 through 9 are incorporated herein by reference.

11. THE LAITRAM CORPORATION is the owner, by assignment, of the entire undivided right, title and interest in and to United States Patent No. 4,051,949, entitled "Conveyor System," which issued on October 4, 1977. Intralox, Inc. is the exclusive licensee of said patent.

12. Intralox, Inc., is the exclusive licensee of THE LAITRAM CORPORATION under U.S. Patent No. 4,051,949.

13. Defendant, CWC has been, and still is, infringing U.S. Patent No. 4,051,949, and is inducing and contributing to the infringement thereof by others, by making, using or selling

conveyor belts or modules, namely, its CRB 3000 modular plastic belts, embodying the patented invention, and will continue to do so unless enjoined by this Court.

14. Said acts of infringement have been willfully committed both within this judicial district and elsewhere.

15. As a result of the aforementioned actions of defendant, plaintiffs have been and continue to be damaged.

WHEREFORE, plaintiffs pray:

A. That the Court preliminarily and permanently enjoin CWC, its subsidiaries, agents, servants, and employees from infringing United States Patent Nos. 3,870,141, and 4,051,949, and, more particularly, from the manufacture, use and sale of CWC's CRB 3000 modular plastic belt;

B. That the plaintiffs be awarded judgment against the defendant for damages, for an accounting, for treble damages in accordance with 35 U.S.C. §284, and for reasonable attorneys' fees in accordance with the provisions of 35 U.C.S. §285; and

C. For interest, costs, and such other and further relief as may be just and proper.

DATE:_____ By_____

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE LAITRAM CORPORATION) and INTRALOX, INC. Plaintiffs, v. THE CAMBRIDGE WIRE CLOTH COMPANY, Defendant.	Civil Action No. S-89-756

DECLARATION OF PETER K. BAILEY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I, Peter K. Bailey, hereby declare and state as follows:

1. I am Vice President of Manufacturing and Engineering of the Cambridge Wire Cloth Company (CWC).

2. As Vice President of Manufacturing and Engineering, I am aware of the design and manufacture of the plastic modular conveyor belt presently

marketed by CWC as the CRB-3000, which is the asserted infringing product.

3. The parties are no strangers to litigation, having been involved in two previous lawsuits concerning plastic modular conveyor belts.

4. During the Cam Clean II litigation and prior to the trial, CWC had been engaged in designing a new plastic modular conveyor belt. The new design was generated both out of concern that the Cam Clean II was an inferior product from the standpoint of strength and to further insure the avoidance of infringement of Plaintiff's patents with a superior strength redesigned product.

5. CWC followed specific teachings of the prior art, as interpreted during previous litigations, to avoid designing an infringing device.

6. The CRB-3000 is a non-reversible conveyor belt which is constructed from at least four and up to six different types of load bearing members or units. Each of these different types of units has a multiplicity of link ends and an integrally formed intermediate structure joining the link ends.

7. CWC does not manufacture and has never manufactured any CRB-3000 product which is constructed solely from one type of member or unit.

8. Each side of each unit of the CRB-3000 has unequal width link ends. Not only are these link ends of unequal width with respect to other link ends on the same side of the unit, but no link end on one side of a unit is of the same width as any link end on the other side of that unit.

9. The space between different pairs of link ends differs. The space between certain pairs of link ends is less than the width of a link end. The space between other pairs of link ends is greater than two times the width of a link end.

10. None of the units used in the CRB-3000 is end-to-end reversible. The edge units are specifically designed to be used on a particular edge of the belt. Each belt uses at least a small edge unit on the right hand side of the belt, a small edge unit on the left hand side of the belt, a larger edge unit on the right hand side of the belt and a larger edge unit on the left hand side of the belt. None of these edge units are interchangeable from one side of the belt to the other and the units for each side require different molds.

11. The small edge units have a single link end on one side. These units cannot be cut to obtain useful fractional links. The large edge units have unequal width link ends and cannot randomly be cut between any pair of link ends to provide a useable fractional unit, but must be cut, if at all, at only a single specific point.

12. All of the edge units have been designed to contain a patent pending rod-retention system which holds the pivot rods in place.

13. Assembly of the CRB-3000 belts requires the separate handling of the left edge pieces from the right edge pieces. Each unit, including the interior units, must be properly oriented prior to linking the units together with a pivot rod. The need for proper

orientation is caused by the unlike widths of the link ends on each unit.

14. The minimum width of a CRB-3000 belt is 6". A 6" belt is constructed only from edge units. Belts of increased width are constructed with the use of internal units, in addition to the edge units. The internal units do not have a rod retention system and are capable of being used only on the interior of the belt. The internal units cannot be randomly cut between any pair of link ends to provide a useful fractional unit, but must be cut, if at all, at only a single specific point.

15. Like the Malard reference, CRB-3000 products which are constructed from more than five types of units have seams traversing two rows of connected modules in the direction of travel of the belt. Also, as shown in Malard's Figure 9, CRB-

3000 belts which are constructed from five units do not have such seams.

16. None of the units of the CRB-3000 have elongated vanes which are of different heights from other vanes on the same unit.

17. When assembled, the vanes of the units of the CRB-3000 are not staggered across the pivot axis at the surface of the belt. The CRB-3000 has a continuous seam or gap which runs across the belt in a direction transverse to the direction of travel of the belt.

18. In determining a suitably sized gap, CWC measured the gap shown in the drawing of the Perkins' patent and determined its proportions compared with the width of the adjacent units. CWC then proportionally designed the gap of the CRB-3000 with respect to the width of the adjacent CRB-3000 units.

19. The CRB-3000 specifically is designed not to be used interchangeably as a replacement part for either the Cam Clean I or Cam Clean II conveyor belts. The CRB-3000 cannot be used as a replacement part for either of those belts.

20. The CRB-3000 is designed to be used with the same comb and sprocket as the Cam Clean I and II devices. Thus, there is a superficial resemblance between the CRB-3000 and the Cam Clean I and II.

21. Exhibits A-D are physical samples of four different types of CRB-3000 belts.

22. Exhibit A, attached hereto is a sample of a CRB-3000 conveyor belt constructed solely from the four types of edge units.

23. Exhibit B, attached hereto is a sample of a CRB-3000 constructed from four types of edge units and one type of internal unit.

24. Exhibit C, attached hereto is a variation of a CRB-3000 belt having four types of end units and two types of internal units. Two 3" units are randomly inserted into the belt and disposed adjacent to each other resulting in a seam that traverses three pitches of the belt.

25. Exhibit D, attached hereto is a variation of a belt using four types of edge units and two types of internal units. This belt has a single 3" segment inserted randomly in the belt resulting in a seam that traverses two pitches of the belt.

26. Exhibits A'-D' are photographs of Exhibits A-D respectively and are attached hereto.

27. The CRB-3000 belt cannot be constructed to any desired width. The belts must be constructed in 3" increments, and 6" is the minimum width for a CRB-3000 belt.

I declare under the penalty of perjury that the foregoing is true and correct.

Signed on September 8, 1989 in Cambridge, Maryland:

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PETER K. BAILEY

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 91-1288

THE LAITRAM CORPORATION AND
INTRALOX, INC.,

Plaintiffs-Appellants,

v.

THE CAMBRIDGE WIRE CLOTH COMPANY,

Defendant-Appellee.

BRIEF FOR PLAINTIFFS-APPELLANTS

STATEMENT OF THE ISSUES

Whether the District Court erred as a matter of law in granting summary judgment of non-infringement without comparing the claims at issue to the accused product.

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SUMMARY OF THE ARGUMENT

A determination of infringement requires a comparison of the accused product to the claims. Envirotech Corp. v. Al George, Inc., 730 F.2d 753, 758, 221 USPQ 473, 477 (Fed. Cir. 1984). The accused product is PX-1. To date, the District Court has never compared the claims to the accused product (PX-1) and has made no finding with regard to the accused product and the patent claims.

The District Court, having now found that the accused product PX-1 was in existence, is required by this Court's order to proceed with respect to PX-1. The District Court cannot ignore this Honorable Court's mandate, ignore the accused product (PX-1), and reinstate its prior vacated summary judgment decision

which was based on non-accused hypothetical products.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE LAITRAM CORPORATION)
and Intralox, Inc.)
vs.) No. S-89-756 CIVIL
THE CAMBRIDGE WIRE CLOTH COMPANY)

FEBRUARY 11, 1991

BALTIMORE, MARYLAND

The above entitled case came on for hearing before the Honorable Frederic N. Smalkin at 10 a.m.

A P P E A R A N C E S

FOR THE PLAINTIFFS:

Thomas D. Washburne, Esq.
Paul J. Hayes, Esq.
Victor B. Lebovici, Esq.

FOR THE DEFENDANT:

G. Franklin Rothwell, Esq.
William T. Enos, Esq.

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Witness now wants to redefine as the product. That is the problem we had in the previous situation. I really would like to try to avoid the area.

THE COURT: No, we are not going to avoid it, because it is the direct question that is at issue. Overruled. Go ahead.

THE WITNESS: The CRB 3000 belt at the time the Complaint was filed was our -- what we referred to as a closed rib or raised rib design that was made of four or five different types of modules.

BY MR. ROTHWELL:

Q: What were these four or five different types of modules?

A: Well, there were small and large edge modules, both left-hand and right-hand, which were not interchangeable,

molded differently. So, those were four different modules.

The fifth module was what we call the internal module, which would be added into the belt depending on the width desired.

Q: When did you first begin designing the CRB 3000?

A: We began in the --

THE COURT: Well, hold on. I have got to stop here for a minute, before I get thoroughly confused.

What is the relationship between what you have just described as CRB 3000 and that thing that is sitting in *[page 19]* front of you, that gray thing, Plaintiffs' Exhibit 1, I think it is?

THE WITNESS: That would be the exact thing, Your Honor. This one has five modules -- five types of modules, because

it includes the internal module, and that is exactly what I described.

THE COURT: So, that is the CRB 3000.

THE WITNESS: Yes, Your Honor.

THE COURT: Okay. And it did exist as of March 15th of '89; is that correct?

THE WITNESS: Yes, it did.

THE COURT: All right. Go ahead.

BY MR. ROTHWELL:

Q: Would you outline the history from beginning of the design of the CRB 3000 to the making of the first one?

A: Well, the design began in '87; the tooling, as I recall, was ordered in mid-'88 and finished in November of '89, at which time we molded belts and tested them.

THE COURT: November of '89?

BY MR. ROTHWELL:

Q: '89? Did you mean '88?

A: November of '88. I am sorry.

THE COURT: All right. Go ahead.

THE WITNESS: These belts were tested in November and December of '88; and, in December of '88, the design was ***[page 20]*** modified to include the gap over the pivot rod, and modules of that design were made and tested in December and January and tooling, final tooling ordered for the gap design in January of 1989.

Q: Was there a show in late January, 1989?

A: Yes, there was.

Q: And was the CRB 3000 belt involved in any way in that show?

A: Yes, it was.

Actually, at the show, we had both the original design and the modified gap design; and, we also had the brochure which had been made for circulation to potential customers, and that depicted

only the gap design. The gap design being the final CRB 3000 design.

THE COURT: And that is what you see in 1.

THE WITNESS: Yes, Your Honor.

THE COURT: Plaintiffs' 1.

BY MR. ROTHWELL:

Q: With regard to any belts of the CRB 3000 which were made prior to March 15, 1989, can you describe the configuration of those belts vis-a-vis the five different modules?

MR. HAYES: Objection. Your Honor, it was testified that the only belt made prior to March 15, 1989 is PX-1, and the configuration speaks for itself right in front *[page 21]* of you.

THE COURT: Well, number one, I don't know if any belts were made before

that -- that was the previous question -- other than the one sitting there, or any other --

Except for that sample that is physically embodied in PX-1, what if any other products conforming to the CRB 3000 modified gap design were in existence, Mr. Bailey, on March 15th, '89?

A: There were more belts made, Your Honor, in limited quantity, because the gap had to be hand cut; but, there was a larger sample belt at the show and there also -- there is also a nine inch wide belt depicted in our brochure which had been made and photographed prior to -- for the show and prior to the Complaint.

THE COURT: Go ahead.

MR. ROTHWELL: I would like to show you Defendant's Exhibit 2, which is a brochure.

THE CLERK: Exhibit 2 marked for identification.

BY MR. ROTHWELL:

Q: Can you identified Exhibit 2?

A: Yes. That is the brochure that was made for distribution at the January, February show in 1989.

Q: Does that contain a depiction of any belt that was made as of that date?